FILE COPY

Office Supreme Court, U.S.
FILED
JAN 5 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 570.

JOHN DAQUINO and SAM DAQUINO,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRENDAN T. BYRNE,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Court House,
Newark, New Jersey.

SANFORD M. JAFFE,
Special Legal Assistant Prosecutor,
Of Counsel, On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4994

TABLE OF CONTENTS.

	PAGE
STATEMENT OF QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENT:	
1. Certiorari should be denied because the Federal question alleged to have been raised by this petition is totally without substance	4
2. The State Court did not decide a substantial Federal question	7
CONCLUSION	9

CASES CITED.

Grundling v. *Chicago*, 177 U. S. 183 (1899)	4
Lehon v. *Atlanta*, 242 U. S. 53 (1916)	4
Lovell v. *Griffin*, 303 U. S. 444 (1938)	4
Lee v. *New Jersey*, 207 U. S. 67 (1907)	5
State v. *Daquino*, 56 N. J. Super. 230 (1959)	3, 4, 6, 8

UNITED STATES CONSTITUTION CITED.

14th Amendment	7

New Jersey Statutes Cited.

	PAGE
R. S. (N. J.) 23:7-1	6
R. S. (N. J.) 32:1-146.6	1, 2, 6
R. S. (N. J.) 32:1-146.7	2
R. S. (N. J.) 32:1-35.1	5
R. S. (N. J.) 32:1-35.10	6

Other Authority Cited.

McKinney's Unconsol. Laws of N. Y. § 6601	5
McKinney's Unconsol. Laws of N. Y. § 6610	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 570.

JOHN DAQUINO and SAM DAQUINO,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Statement of Question Presented.

Did the State Court decide a Federal question of substance?

Statement of the Case.

As indicated in the Petition for Certiorari (p. 5), defendants John and Sam Daquino were convicted in the Newark Municipal Court and fined $10.00 each for violating R. S. (N. J.) 32:1-146.6, a penal statute of the State of New Jersey. The statute (hereinafter called the Terminal Statute) provides, so far as material, that:

> "(1) No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air or bus terminal, owned or operated by the Port Authority * * *.
>
> "(a) sell, or offer for sale any article of merchandise; * * *" (Pet. p. 3).

Violations are punishable by fine not exceeding $10.00, imprisonment not exceeding 30 days or both (R. S. (N. J.) 32:1-146.6, 7).

The material evidence and stipulations in the Municipal Court showed that the defendants, without any Port Authority authorization, and despite repeated warnings to desist, had at the date and time set forth in the complaint, sold food and coffee on the apron of a hangar located in the center of the Newark Air Terminal, an air terminal operated by the Port Authority.

There was no evidence that defendants ever had requested permission from the Port Authority to conduct their business at Newark Airport (Pet. p. 19). Defendants' sole constitutional contention on this Petition is that the Terminal Statute is void on its face because of conflict with the equal protection clause (Pet. pp. 2, 3). While in view of this contention, most of the evidence reproduced in the petitioners' Statement of the Case (Pet. pp. 5-9) must be deemed irrelevant, the State has no objection to the Statement with the addition, however, of the following testimony of defendant John Daquino (126a-21 to 27)*:

> "Q. Mr. Daquino, how many times have you been asked to remove your truck and your business from

* Page 26a, Appendix to Defendant's Brief in the Appellate Division.

the vicinity of the Newark Air Service hangar, by The Port of New York Authority, please? A. A couple of times.

Q. A couple of times. How many would you say? A. Two or three. That is all."

As appears in the Petition (Pet. p. 9) the alleged question of the constitutionality of the Terminal Statute was first raised on defendants' appeal to the Appellate Division of the Superior Court, the third hearing of this matter by the New Jersey courts. At the prior trials in the Newark Municipal and Essex County courts, entirely unrelated arguments against conviction had been advanced. (See Opinion of the Essex County Court, in the Record at D7a). In the Appellate Division, the argument was precisely the same as that stated in the second paragraph on page 10 of the Petition for Certiorari. *State* v. *Daquino*, 56 N. J. Super. 230, 235 (1959) (Ds34a)**. Notwithstanding its view that the injection of new issues at so late a stage was "repugnant to the spirit of our practice," the Appellate Division reviewed the Statute to determine whether or not the projected constitutional issue was in fact, involved. It concluded that the Terminal Statute was not a delegation of licensing power and therefore was "free of the constitutional infirmity attributed to it." *State* v. *Daquino, supra*, at p. 240 (Ds39a). There was no dissent. As the Petition for Certiorari indicates (p. 2), when the defendants sought review by the Supreme Court of New Jersey of that conclusion, their Petition for Certification was denied.

** Page 4, Supplemental Appendix to Defendant's Petition for Certification.

ARGUMENT.

1. Certiorari should be denied because the Federal question alleged to have been raised by this Petition is totally without substance.

In the New Jersey court, as here, defendants' claim that they were denied the equal protection of the laws was based entirely on alleged defects on the face of the Terminal Statute. This was the only avenue of attack available to them. Having conceded the absence of evidence that they ever had applied to the Port Authority for permission to sell at Newark Airport (*State* v. *Daquino*, 56 N. J. Super. 230, 235 (1959) (Ds54a)), defendants were confronted with this Court's decisions that one may not complain of arbitrary or discriminatory application of licensing powers to which he has not been subjected. See, e. g., *Lehon* v. *Atlanta*, 242 U. S. 53 (1916); *Grundling* v. *Chicago*, 177 U. S. 183 (1899). Accordingly, they disavowed concern "with the *practice* of the Port Authority under the statute," and, relying on this Court's decision in *Lovell* v. *Griffin*, 303 U. S. 444 (1938) (Pet. 19), based their appeal on the assertion that the Terminal Statute is a licensing statute and that therefore, the absence, in the provision of the statute quoted above (p. 2) of standards to govern the grant of authorization raises an issue under the equal protection clause. (Emphasis defendants'.)

Defendants predicate this argument on the assumption that the Terminal statute is a delegation of regulatory powers. They have cited no Federal case, and we are aware of none, holding that a statute delegating such powers, which neither on its face nor in necessary effect is dis-

criminatory, must contain express provisions against discriminatory administration in order to satisfy the requirements of the equal protection clause. Consequently, defendants' argument that the Terminal Statute is void on its face under the equal protection clause solely because of the omission of standards would appear, at best, no more than a lightly veiled attempt to circumvent this Court's policy against reversing state judgments enforcing state statutes at the behest of a defendant who has himself suffered no deprivation of federally protected rights. *Ley v. New Jersey*, 207 U. S. 67 (1907).

Assuming, however, that the equal protection clause would require the inclusion of administrative standards in a statute which delegated regulatory powers, the principle is completely inapplicable to the Terminal Statute.

The Terminal Statute contains no delegation of powers. It confers no powers whatsoever on The Port of New York Authority, let alone any powers subject to arbitrary or partial administration. It is no more than a simple prohibition of trespass upon terminal property. It is thus comparable to any law penalizing the unauthorized entry on property of another. This is apparent from the background of the legislation as well as from its language. Through bi-state legislation, the States of New York and New Jersey vested The Port of New York Authority with full power to acquire and operate air terminals, including Newark Airport. R. S. (N. J.) 32:1-35.1; *McKinney's Unconsol. Laws of N. Y.* § 6601. The States provided that the Port Authority should have "sole discretion" over "all details of financing, construction, leasing, charges, rates, tolls, contracts and the operation of air terminals • • •

controlled by (it) * * *" R. S. (N. J.) 32:1-35.10; *McKinney's Unconsol. Laws of N. Y.* § 6610; *State* v. *Daquino*, 56 N. J. Super. 230, 239 (1959). Accordingly, and as recited in the opening paragraph of the Terminal Statute (R. S. (N. J.) 32:1-146.6; Pet. p. 3), the Port Authority adopted a regulation warning that unauthorized entry upon the property for various purposes, other than the use of transportation facilities provided for the public thereat, was prohibited. Its power to enact that regulation is nowhere challenged by the defendants. In challenging the Terminal Statute, they attack only the criminal sanctions, enacted by the legislature, against violation of this warning. A challenge to the New Jersey statute, R. S. (N. J.) 23:7-1, punishing trespass upon property "after notice bearing the name of the owner, occupant, lessee or licensee thereof, forbidding the trespass, has been conspicuously posted," would not be distinguishable.

It has never, to our knowledge, been contended that such legislation is susceptible to attack as violating the equal protection clause of the Constitution. By its very nature, this type of legislation applies equally to all persons in the same class, that is persons who enter upon property without the permission of those in legal possession or control. The exception from such a prohibition for persons authorized by owner or occupant to enter upon the property involved is, of course, no more than the necessary definition of the type of conduct prohibited, i. e., unauthorized entry. No further norms or standards are expressed in such a statute because no activity is authorized by the statute to which standards could be applicable or appropriate.

Defendants' allusions, unsupported in a single word of the Statute, to "rights", "privileges" and "licenses", cannot convert the Terminal Statute into a regulatory law. The unwarranted addition of such concepts to a statute in which the legislatures did not even suggest them, cannot create a legitimate question of the statute's validity.

Defendants argue that the exception from the statute's operation of "persons duly authorized by the Port Authority" in itself confers upon the Port Authority "uncontrolled discretion" to grant authorization (Pet. p. 10). The exception, however, neither deals with the manner of authorization nor creates any licensing power. Clearly, should the Authority in the exercise of its powers as operator of the Airport grant to others permission to transact business on Newark Airport premises, it would not, in any sense of the word, be administering this or any other clause of the Terminal Statute. Thus, by no conjecture can this exception be deemed to invalidate the statute on its face.

Properly read, then, the Terminal Statute is seen to create no classification nor confer any powers susceptible of arbitrary or discriminatory operation. It therefore presents no question involving consideration of the equal protection clause of the 14th Amendment.

2. The State Court did not decide a substantial Federal question.

In concluding that the Air Terminal statute was "free of the constitutional infirmity attributed to it", the Appellate Division did not decide a substantial federal question. The court made this clear when it stated, with respect to the statute, that

> "the legal principles concerning norms or standards for the administrative regulation or licensing of businesses, trades or occupations, generally, are totally inapposite." *State* v. *Daquino*, 56 N. J. Super. 230, 240 (1959); Pet. p. 13.

This conclusion by the court was a determination that defendants' attack upon the Terminal Statute was groundless because it was based upon a misapprehension of the nature of the statute. The court rejected defendant's contention that the statute fell within the category of governmental regulations, restrictive of a right to do business, in which the prescription of standards to guide in impartial administration of delegated powers may be appropriate. In so finding, the Court did not interpret or apply the equal protection clause of the United States Constitution. It merely reviewed the statute in the light of the language, the type of activity to which it applied and the obvious purpose of the enactment and concluded that the alleged constitutional issue was founded on a gross distortion of the meaning of the law. As we have already pointed out, no other conclusion was possible in view of the plain meaning and evident purpose of the statute. Thus, the state court decided no question appropriate for review by this Court.

Conclusion.

The defendants' contention that they have been deprived of a constitutional right is based on the incorrect assumptions that the statute under which they were convicted conferred power to license and regulate business and that the State Court viewed it as such. Neither assumption is correct. The necessary correction of their unwarranted assumptions, completely vitiates any assertion that there is a Federal question cognizable by this Court. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

BRENDAN T. BYRNE,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Court House,
Newark, New Jersey.

SANFORD M. JAFFE,
Special Legal Assistant Prosecutor.
Of Counsel, On the Brief.